

August 29, 2016

VIA EMAIL: jacquelinerobinson@mail.maricopa.gov

Jacqueline Robinson
Air Pollution Hearing Board Administrator
Maricopa County Air Quality Department
301 W. Jefferson Avenue
Phoenix, AZ 85003

Re: APHB Docket No. MCAPHB2016-001

Dear Ms. Robinson,

Please find the attached brief for the argument about the Maricopa County Air Pollution Hearing Board (Board) jurisdiction over this appeal and the responses to the Board's questions. I am responding as required by Scheduling Order Cause NO. MCAPHB2016-01-PA dated August 19, 2016.

Sincerely,


Daniel E. Blackson

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ATTACHMENT

Maricopa County Air Pollution Hearing Board

APHB Docket No. MCAPHB2016-001

Jurisdiction Brief

Prepared by: Daniel E. Blackson

August 29, 2016

Please find the responses to the questions from the Maricopa County Air Pollution Hearing Board questions regarding the Board's jurisdiction over appeal Docket No. MCAPHB2016-001.

Question #1:

Does the language of A.R.S. § 49-482, which states "[w]ithin thirty days after notice is given the control officer of approval or denial of a permit, permit revision, or conditional order, the applicant and any person who filed a comment on the permit or permit revision ... may petition the hearing board ... for a public hearing The hearing board, after notice and a public hearing, may sustain, modify, or reverse the action of the control officer" limit the Board's authority to just the "permit, permit revision or conditional order" that was approved or denied?

Response:

The reference to "approval or denial of a permit, permit revisions, or conditional order" are the entry criteria for the applicant to satisfy in order to petition the hearing board. If one of these actions did not occur, the applicant or any person who filed a comment would be unable to petition the hearing board for a public hearing. Once the entry criteria is satisfied and the applicant or person who filed a comment petitions the hearing board, the Board has the authority after a public hearing to "sustain, modify or reverse the action of the control officer" per A.R.S. 49-482.A.

The Board's authority is not just limited to the "permit, permit revision or conditional order" that was approved or denied. A.R.S. 49-482.A allows "...any person who filed a comment on the permit or permit revision pursuant to section A.R.S. 49-480, subsection B and section 49-426, subsection D, ..., may petition the hearing board, in writing, for a public hearing...". The source of the person's petition to the Board for a public hearing is the person's comments on the permit or permit revision. The statute does not place any limit, restriction, or prohibition on the comments. In fact, A.R.S. 49-426.D requires that "The department shall consider and prepare written responses to all comments received during the public comment period including comments made at a public hearing conducted by the department." The plain language of the statute does not limit the Board's authority to hearing only specific issues pertaining to the permit or permit revision. If the legislature did want to limit the Board's authority in this area it certainly could have, but it did not. The Board has broad authority to hear public comments and concerns in order to determine the appropriate permit actions of the control officer.

Additionally, A.R.S. 49-482.A states "The hearing board, after notice and a public hearing, may sustain, modify or reverse the action of the control officer." This clearly implies that the hearing board's authority is not limited to just the "permit, permit revision or conditional order" because the hearing board has the authority to modify the action of the control officer. Since the statute gives the hearing board the broad authority to "sustain, modify or reverse the action of the control officer", the hearing board is not limited to just the "permit, permit revision or conditional order", but the hearing board's authority extends to all actions taken by the control officer. In this case, the control officer did not consider and respond to all comments at a public hearing, so the hearing board has the authority to hear those comments and act upon them as the control officer was obligated to do.

If legislature wanted to limit the hearing board's authority to just the "permit, permit revision or conditional order" that was approved or denied, the legislature would not have given the hearing board the authority to "sustain, modify or reverse the action of the control officer". The action of the control officer extends beyond the approval or denial of a permit, permit revision or conditional order, and therefore, the hearing board's authority overlaps the extent of the control officer's actions.

Another way to view the statute is to consider why the appeal process to the hearing board was put in place. What if the control officer erred? The appeal process to the hearing board gives the public an opportunity to correct a permit, whether a condition or omission, to protect public health, property rights, and/or the environment. If the hearing board's authority was limited to just the "permit, permit revision or conditional order" that was approved or denied, the hearing board would not have the ability to hear the comments from the public hearing to fulfill its duty to "sustain, modify or reverse the action of the control officer."

Question #2:

Does A.R.S. § 49-480.02, subsection A, expand in any way the rights granted under A.R.S. 49-482?

Response:

A.R.S. § 49-480.02, subsection A, does not necessarily expand the rights granted under A.R.S. 49-482. As indicated above, 49-480.02 is consistent with the plain meaning of 49-482. The rights of the applicant or petitioner are consistent where an appeal must be made within 30 days of an approval, denial, or revocation of a permit and prior comments had to be made by the petitioner. But there are differences in the wording of the statutes.

A.R.S. § 49-480.02 allows for an appeal when "the control officer gives notice of approval, denial or revocation of a permit", where A.R.S. 49-482 allows an appeal when "notice is given by the control officer of approval or denial of a permit, permit revision, or conditional order." In this case, A.R.S. 49-482 "expands" to include "permit revision and "conditional order", but "contracts" rights by excluding "revocation of a permit."

A.R.S. § 49-480.02 is more expansive because it gives the hearing board jurisdiction to make a decision without any bounds or limits, where A.R.S. 49-482 has specific language that “[t]he hearing board, ... may sustain, modify or reverse the action of the control officer”.

A.R.S. § 49-480.02 states that previous comments had to be submitted pursuant to A.R.S. 49-480, where A.R.S. 49-482 is more “restrictive” because it requires that previous comments had to be filed on the permit or permit revision pursuant to section 49-480, subsection B and section 49-426, subsection D.

However, when read properly, A.R.S. 49-482 grants the same level of rights as 49-480.02. Based on a proper application of statutory construction, the statutes have to be interpreted so that they can both be given effect. In short, when read together they essentially help define the parameters of review the legislature anticipated.

Question #3:

Does the Regulatory Bill of Rights, A.R.S. § 49-471.01 to .15, expand in any way the rights granted under A.R.S. § 49-482?

Response:

Again, the plain language of ARS 49-482 gives the Board broad authority to hear and consider comments/issues. This interpretation of 49-482 is consistent with the Regulatory Bill of Rights – especially when the statutory provisions are read in conjunction. Notwithstanding the foregoing, it could, in the alternative, be argued that the Regulatory Bill of Rights, A.R.S. § 49-471.01 to .15, expands the rights granted under A.R.S. § 49-482.

Specifically, the Regulatory Bill of Rights (A.R.S. § 49-471.01) states:

A. To ensure fair and open regulation under this article by counties, a person: ...

12. May have appealable agency actions heard by a hearing board or administrative law judge as provided in section 49-471.15.

A.R.S. 49-471.01.A.12 allows a person to have an appealable agency action heard by a hearing board. An “appealable agency action” is defined as “an action that determines the legal rights, duties or privileges of a party”. (See A.R.S. 49-4714.(a)) It must also be noted that an appealable agency action “[d]oes not include decision or action that must be appealed to the hearing board pursuant to section 49-476.01, 49-480.02, 49-482...”. (See A.R.S. 49-471.4.(d).) However, an appeal can be made to the hearing board through three pathways, one through A.R.S. 49-482, a second through A.R.S. 49-471.01.A.12, and a third through A.R.S. 49-471.15.A.

When appealable agency actions occur (A.R.S. 49-471.01.12) or when someone will be adversely affected by an appealable agency action (A.R.S. 49-471.15.A) and an appeal is made, the hearing board is required to conduct a hearing per A.R.S. 471.15. Then the

appeal is based on the merits of the comments and does not limit the hearing board to approval or denial of a permit, permit revision, or conditional order or action of the control officer.

Subsections A.R.S. 49-471.02 through A.R.S. 49-471.14 do not expand in any way the rights granted under A.R.S. § 49-482.

Question #4:

Does the provision of A.R.S. § 49-480, subsection B, which states that “[p]rocedures for the review, issuance, revision and administration of permits issued pursuant to this section and not required to be obtained pursuant to title V of the clean air act shall impose no greater procedural burden on the permit application than procedures for the review, issuance, revision and administration of permit issued by [ADEQ] under sections 49-426 and 49-426.01 and other applicable provisions of this chapter” expand or limit the Board’s jurisdiction in any way?

Response

The above provision does not expand or limit the Board’s jurisdiction in any way. The procedure for the review, issuance, revision and administration of permit issued are outlined in statute (A.R.S 49-426 and 49-426.01) and placed into code and rule by ADEQ and MCAQD (County Board of Supervisors). By statute, ADEQ and MCAQD are responsible to ensure their codes and rules “impose no greater procedural burden on the permit application than procedures for the review, issuance, revision and administration of permit issued the department under section 49-426 and 49-426.01.” The Board does not have a role in establishing procedures for the review, issuance, revision, and administration of permits issued. Therefore A.R.S. § 49-480, subsection B, does not expand or limit the Board’s jurisdiction in any way.

The Board is statutorily responsible for appeals and hearings that approval or denial of a permit or a permit revision or sustain, modify or reverse the action of the control officer. The related statutes, A.R.S 49-471.01, A.R.S. 49-471.15, A.R.S. 49-480.02, and A.R.S. 49-482, are not imbedded in the procedure for the review, issuance, revision and administration of permits issued and are no burden on the permit application and not under the purview of ADEQ or MCAQD.

Question #5:

Is there any statutory or regulatory provision, case law or other precedent that addresses whether the Board has jurisdiction to revise or remand back to the Department the underlying permit (as opposed to the permit revision that was specific action of the Department), based on comments relevant to the underlying operation or permit, but not the specific action taken by the Department?

Response:

When an appeal is made under the Regulatory Bill of Rights, A.R.S. 49-471.01.12, there are no qualifiers on the hearing board’s decision so revising the underlying permit or

remanding the underlying permit back to the Department are available to the hearing board.

When a person will be adversely affected by an appealable agency action, that person may appeal the action to the air pollution hearing board according to A.R.S. 49-471.15.A. There are no qualifiers in A.R.S. 49-471.15.A on the hearing board's decision, so revising the underlying permit or remanding the underlying permit back to the Department are available to the hearing board.

For an appeal of permit action, Arizona Revised Statutes gives the Board jurisdiction to revise the underlying permit in 49-482.A, which states:

"Within thirty days after notice is given by the control officer of approval or denial of a permit, permit revision or conditional order, the applicant and any person who filed a comment on the permit or permit revision pursuant to section 49-480, subsection B and section 49-426, subsection D, or on the conditional order pursuant to section 49-492, subsection C, may petition the hearing board, in writing, for a public hearing, which shall be held within thirty days after receipt of the petition. The hearing board, after notice and a public hearing, may sustain, modify or reverse the action of the control officer."

The last sentence of the subsection gives the Board the jurisdiction to "modify" or "revise" the action of the control officer, where the action of the control officer has actions such as to grant or deny applications (A.R.S. 49-481), require a permit (MCAQD Rule subsection 301), act on permit application (MCAQD Rule 220 subsection 301.6), approve or deny a permit or permit revision (MCAQD Rule 200 subsection 401), impose permit conditions (MCAQD Rule 200 subsection 310.2), hold a public hearing (MCAQD Rule 220 subsection 407.4), and prepare written responses to all comments at a public hearing and make responses available to all commenters (MCAQD Rule 220 subsection 497.6). To this end, the hearing board would have jurisdiction to provide written comments to the petitioner to satisfy the appeal in lieu of the control officer.

The hearing board is also given the jurisdiction to modify (i.e., revise) the permit or permit revision in A.R.S. 49-496 subsection F, which reads:

F. The hearing board may revoke or modify an order of abatement or a permit or permit revision only after first holding a hearing within thirty days from the giving of notice of such hearing as provided in section 49-498.

MCAQD Rule 200 §401 provides procedures for permit reopenings; revocations and reissuance; and termination, but the actions can only be done by the Control Officer or the Administrator. There is no provision for the Board to engage this rule.

Case law or other precedents that addresses the subjects in Question #5 were not found.

Summary of the Questions

In summary, appeals to the hearing board have three routes:

- 49-471.01.12 (appealable agency action)
- 49-471.15 (adversely affected)
- 49-480.02 (appeals of permit action)

All three of these appeal pathways identified in A.R.S. 49-471.15 under administrative appeals. Subsection A describes a direct appeal to the hearing board for an appealable agency action and an adverse affect by an appealable agency action. A.R.S 49-471.15.A goes on to differentiate administrative appeals of decisions to approve, deny or revoke a permit, permit revision or conditional order and explains that they are governed by sections 49-480.02 and 49-482.

When an appealable agency action occurs, a person may have the appealable agency action heard by a hearing board or an administrative law judge. There is not a qualifying timeframe or other requirement that the person has to satisfy. The action that the hearing board may take is not described, which allows the hearing board to determine the appropriate judgment. According to A.R.S. 49-47101.13 the appeal hearings are governed by uniform administrative procedures set forth in A.R.S. 49-496, which do not limit or bound the jurisdiction or decision of the hearing board.

When a person will be adversely affected by an appealable agency action, that person may appeal the action to the air pollution hearing board. To qualify to make an appeal, the person must have exercised any right to comment on the action provided by law, or, ordinance. Additionally, the grounds for the appeal are limited to issues raised in the party's comments. There is no additional statutory language in A.R.S. **49-471.15** that limits or bounds the jurisdiction or decision of the hearing board.

When a person makes an administrative appeal based on approval, denial or revocation of a permit, the appeal is governed by sections A.R.S. 49-480.02 and A.R.S. 49-482. Note that A.R.S. 49-480.02 does not list a "permit revision" or "conditional order". To qualify to make an appeal under A.R.S. 49-480.02, the person must request an appeal within thirty days after the control officer gives notice of approval, denial or revocation of a permit and the person must have submitted comments pursuant to A.R.S. 49-480. A.R.S. 49-480.02 has no statutory language that limits or bounds the jurisdiction or decision of the hearing board.

A.R.S. 49-482 is put into play by A.R.S 49-471.15.A when "decisions to approve, deny or revoke a permit, permit revisions or conditional order" are made and by A.R.S. 49-480.02 when "the control officer gives notice of approval, denial or revocation of a permit". A.R.S. 49-482 reiterates that the appeal must be within 30 days of the announcement and the person must have previously filed comments. The statutory language that limits the jurisdiction and decision in A.R.S. 49-482 is: "The hearing board, after notice and a public hearing, may sustain, modify or reverse the action of the control officer."

Conclusion

The appeal to the Maricopa County Air Pollution Board made by Daniel E. Blackson on July 12, 2016 (Docket No. MCAPHB2016-001) should be heard in its entirety. It is a direct appeal to the Board through the Regulatory Bill of Rights and adverse affects. It also meets the qualifiers in an administrative appeal because it was filed within 30 days of a control officer decision to revise a permit and previous comments were made by the petitioner at a public hearing on the permit revision.

The appeal should be heard in its entirety, including all comments on the underlying permit, for the following reasons:

- MCAQD never stated in the public hearing process that there was a limitation, restriction, or prohibition of comments related to the permit or supporting documents.
- A.R.S., A.A.C., and MCAQD Rules do not limit, restrict, or prohibit comments on the entire permit at public hearings.
 - See MCAQD Rule 220 Non-Title V Permit Provisions §407 Public Participation. § 407.6 states: "The Control Officer shall keep a record of the commenters and the issues raised during the public participation process and shall prepare written responses to all comments received."
 - See A.A.C. R18-2-330 Public Participation. Note that A.A.C. R18-2-330.G requires a response to all comments received.
 - See A.R.S. 49-426 .D (also response to all comments received) & A.R.S. 49-112.
- MCAQD must reply to all comments from a Public Hearing. See above references.
- A.R.S., A.A.C., and MCAQD Rules do not limit, restrict, or prohibit comments beyond minor permit modification actions
 - See MCAQD Rule 220 Non-Title V Permit Provisions §405.2 Minor Permit Revisions
 - See A.A.C. R18-2-319 Minor Permit Revisions
 - See A.R.S. 49-426 and A.R.S. 49-426.01
- MCAQD has set a precedent by replying to all comments from a Public Hearing (10/21/15) on a similar minor permit modification for Air Quality Permit to Operate and/or Construct.
- MCAQD allowed and responded to other comments from the public hearing that were not related to the minor permit modification issues.
- As a previous Environmental Manager and Operations Manager, the organizations that the petitioner worked for always considered that comments could be made on the entire permit when making a minor permit modification. The reason? Nothing in the laws, regulations, and rules prevented it.
- MCAQD should not be allowed to pick and choose which public participation comments will receive a response and which will not.
- MCAQD should be encouraged that the public is participating and should find a way to support their rights. MCAQD should seek and nurture all methods of input to control air pollution.
- Assist MCAQD's efforts to fulfill its mission: "We exist to provide clean air to Maricopa County residents and visitors so they can live, work and play in a healthy environment."

As a further discussion of the right granted in A.R.S. 49-426 for the right to make comments at a public hearing, the subsection D states:

"... Grounds for comment are limited to whether the proposed permit meets the criteria for issuance prescribed in this section or in section 49-427. The department shall consider and prepare written responses to all comments received during the public comment period including comments made at a public hearing conducted by the department. ..."

The statute does not limit the comments to the items that are being revised in the permit, but to *"the criteria for issuance prescribed in this section [A.R.S. 49-426] or in section 49-427"*. A.R.S. 49-426 is titled "Permit; duties of director; exception; applications; objection; fees" and all of the petitioner's comments are consistent with A.R.S. 49-426. Additionally, all of the petitioner's comments are consistent with A.R.S. 49-427 Grant or denial of applications, revisions. In fact, A.R.S. 49-427.A. makes it clear that the underlying permit is subject to comment by stating: "The director shall deny a permit or revision if the applicant does not show that every such source is so designed, controlled or equipped with such air pollution control equipment that it may be expected to operate without emitting or without causing to be emitted air contaminants in violation of this article and the rules adopted by the director." If a commenter at a public hearing makes a comment that the permit or permit revision does not satisfy the requirements in A.R.S. 49-427.A, the agency has an obligation to respond to the comment.

I request that the Maricopa County Air Pollution Hearing Board hear may appeal in its entirety.